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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-54

LINDA ANN MOUNT and
JEROLD H. MOUNT, her husband,
Petitioners,

v.

HAROLD R. SUMNER,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Opinions Below

The opinion of the United States District Court for the Western District of Pennsylvania is set forth on pages A2-A5 of the appendix to petitioner's petition. This opinion is unreported.

The affirmance by the United States Court of Appeals for the Third Circuit is noted at 513 F.2d 626, but not fully reproduced there. This order is set forth on the first page of the appendix to petitioner's petition.

Jurisdiction

Petitioners have invoked the jurisdiction of this Court to issue a writ of certiorari to a Court of Appeals under 28 U.S.C. § 1254(1).

The jurisdiction of the District Court in which this action was instituted was based upon the diversity of citizenship of the parties under 28 U.S.C. § 1332.

Statute and Rule Involved

The Pennsylvania statute limiting the time for bringing actions for personal injuries, Pa. Stat. Ann. tit. 12, § 34; Act of June 24, 1895, P.L. 236. § 2, which reads:

> "Every suit hereafter brought to recover damages for injury wrongfully done to the person, in case where the injury does not result in death, must be brought within two years from the time when the injury was done and not afterwards; in cases where the injury does result in death the limitation of action shall remain as now established by law."

Rule 48 of the Federal Rules of Civil Procedure, which reads:

> "The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury."

Questions Presented

1. Should a United States District Court be permitted to employ a six-member jury in the trial of a civil action?

2. Is a United States Circuit Court required to write an opinion when affirming a District Court's application of state statutory and decisional law in a diversity action?

3. Did the United States District Court for the Western District of Pennsylvania properly apply the Pennsylvania statutory and decisional law governing the limitation of medical malpractice actions?

Statement of the Case

On September 27, 1972, petitioners commenced this action to recover for alleged acts of medical malpractice committed by respondent on and before November 10, 1966. Respondent is an obstetrician who treated wife petitioner during the course of several pregnancies, the last of which terminated in the birth of a child on September 30, 1966. He last saw her in his professional capacity on November 10, 1966, at which time he examined her and advised her that her condition was satisfactory. Approximately six weeks later, on December 25, 1966, wife petitioner experienced a total loss of anal continency and other symptoms which were alleged to be due to respondent's failure to properly repair damage done to the anal sphincter during the course of the several child births.

On January 21, 1974, a jury of six persons and one alternate was selected to hear this case. After the jury was selected counsel for both parties stipulated that the six-member jury would be used and that a verdict of five jurors would be accepted if the jury should be reduced to that number. That stipulation is set forth in the appendix to this brief.

The case was tried before the agreed upon jury and the Honorable Herbert P. Sorg. The question of the Statute of Limitations was submitted to the jury as part of a special verdict and answered as follows:

> 1. Did plaintiffs know or should they have known on or before September 27, 1970, the physical condition of Linda Ann Mount for which they now claim damages existed? Answer *yes*.

2. Did plaintiffs know or should they have known on or before September 27, 1970, the alleged cause of the injuries to Linda Ann Mount for which they now claim damages? Answer *yes*.

In accordance with the District Court's understanding of Pennsylvania's application of Pa. Stat. Ann., tit. 12, § 34 (limiting the time for bringing actions for personal injuries to two years) in medical malpractice actions, judgment was entered in favor of respondent. Petitioners then filed a motion for a new trial, attacking the use and phraseology of the special verdict questions. Substantively, they contended respondent's alleged failure to repair wife petitioner's anal sphincter gave rise to two causes of action; one for the non-repair itself, the other for respondent's not knowing that he should look for a tear in the sphincter. They further contended that the Statute of Limitations only began to run against the second cause of action after respondent's deposition was taken during pretrial discovery.

The District Court denied petitioner's motion for new trial for the reasons stated in the opinion set forth on pages A2-A5 of petitioner's petition. The Circuit Court affirmed the judgment in favor of the respondent without opinion and petitioners then filed the petition now under consideration.

ARGUMENT

I. Petitioners' contention that District Courts should not be permitted to employ six-number juries in the trial of civil actions does not raise a question warranting review by this Court.

In the petition for certiorari petitioners, for the first time, assert it is a mistake to permit the use of a six-number jury in the trial of a civil action.

In *Colgrove v. Battin*, 413 U.S. 149 (1973), this Court held a District Court may, by local rule, require six-number juries for all civil actions. The dissent in that case was largely based on the feeling that such a mandatory rule conflicted with F.R.Civ.P. 48 (permitting the parties to stipulate to a jury consisting of any number less than 12).

In the present case, petitioners, after agreeing to the use of a six-number jury, now assert the use of such a jury should not be allowed. Thus, on the bare assertion that a six-number jury "does not have the internal strength and dynamics to overcome the directions of a trial judge"[1], petitioners asked the Court not only to overrule *Colgrove*, but also to invalidate Rule 48.

In *Colgrove* the Court determined that a six-number jury is as capable of performing its function as is one composed of twelve, stating:

> "Significantly, our determination [in *Williams v. Florida*, 399 U.S. 78 (1970)] that there was 'no discernible difference between the results reached by the two different-sized juries,' 399 US, at 101, 26 L Ed 2d 446, drew largely upon the results of studies of the operations of juries of six in civil cases. Since then, much has been written about the six-member jury, but nothing that persuades us to depart from the conclusion reached in Williams." 413 U.S. at 158-59 (footnote omitted).

There is nothing in the present case which indicates the Court should reconsider its decision in *Colgrove*. In the "directions" which petitioners claim the jury should have been able to "overcome" were, in fact, the trial Court's explanation of his understanding of the Pennsylvania law regarding the limitation of malpractice actions. Such explanations are required by F.R.Civ.P. 49 and the jury is obliged to follow, rather than "overcome", then.

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[1] Petitioner's petition at 7.

This case thus presents no reason to question the correctness of the holding in *Colgrove*, and, *a fortiori*, no reason to challenge the validity of F.R.Civ.P. 48. Therefore, the question of the propriety of using a six-member jury in the trial of a civil action does not require review by this Court.

II. Petitioner's contention that a Circuit Court should be required to write an opinion when affirming a District Court decision on a question of state law does not raise a question warranting a review by this Court.

In *Taylor v. McKeithen*, 407 U.S. 119 (1972), the Court, while holding that, under the particular circumstances presented in that case, the Circuit Court should have explained why it *reversed* the District Court, stated:

> "We, of course, agree that the Courts of Appeals should have wide latitude in their decisions of whether or how to write opinions. That is especially true with respect to summary affirmances. See Rule 21, Court of Appeals for the Fifth Circuit Court." *Id.* at 194 n.4.

It is a general practice of the Circuit Courts, and of this Court, to affirm certain decisions of the Courts below without opinion. The Sixth Circuit, for instance, has repeatedly stated:

> " 'It is not the policy or practice of this court in reviewing cases on appeal where a district court has rendered a comprehensive opinion with which we find ourselves in full agreement, to rewrite such an opinion . . . .' " *Stephenson v. Duriron Co.*, 428 F.2d 387 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970).

Petitioners advance no special circumstance requiring the writing of an opinion here, but apparently contend the Circuit Courts should be required to write opinions in all cases. Indeed, if a Circuit Court may ever decline to write an opinion

it is in a case such as this. Here we have a diversity action in which the only issues presented for the Circuit Court's review were questions of state law. Thus, any opinion the Circuit Court might have written would have been of limited precedential value since it would have been only an attempt to state what the Pennsylvania Courts would have done in a similar situation. Further, the factual setting of this case is not particularly novel and the legal issues raised have been discussed in a number of Pennsylvania appellate Court opinions. *E.g., Schaffer v. Larzelere,* 410 Pa. 402, 189 A.2d 267 (1963); *Ragan v. Steen,* 229 Pa. Super. 515, 331 A.2d 724 (1974).

It is respectively submitted, therefore, that petitioners' assertion that the Circuit Court should have written an opinion presents no substantial issue for review by this Court.

III. Petitioners' assertion the District Court was applying the Pennsylvania statutory and decisional law governing the limitation of medical malpractice actions does not present a question warranting review by this Court.

Although petitioners' complaint alleging respondent's negligence was filed on September 27, 1972, they assert the Statute of Limitations did not begin to run against them until January 3, 1973. Petitioners' petition at 6. This assertion is based on the claim that, on January 3, 1973, they first learned "that the defendant was negligent because he did not have the requisite knowledge of a medical doctor specializing in obstetrics." *Id.* Neither here nor in the Courts below have petitioners cited any authority for the proposition that the reason for a person's negligence gives rise to a cause of action separate from the action for the negligence itself and, indeed, none exists.

The correctness of the decisions below is demonstrated by the opinion of the Superior Court of Pennsylvania[2] in *Ragan v. Steen*, 229 Pa. Super. 515, 331 A.2d 724 (1974), which was decided after the District Court wrote its opinion but in time to be cited in respondent's brief in the Circuit Court. In *Ragan*, the plaintiff consulted his family physician concerning a colony of plantar warts in September of 1968 and was referred to a local hospital for x-ray treatment. Soon after treatment a blister developed but then healed in an apparently normal manner. In November of 1970, however, the tissue in the area treated began to decompose. In March of 1971 the plaintiff filed suit against the radiologist and the hospital. In reviewing the submission of Statute of Limitations issue to the jury, the Superior Court stated:

> "The two year period on actions such as this begins to run when the injury is done. It is undisputed in Pennsylvania that the injury is considered done 'when the act heralding a possible tort inflicts a damage which is physically objective and ascertainable.' *Ayers v. Morgan*, 397 Pa. 282, 290, 154 A.2d 788, 792 (1959). Appellants contend that this point was reached when the blister on the affected area appeared in October 1968 warning the appellee of his damaged condition and that an act of negligence had been committed. Appellee maintains that since the blister healed, the warts were gone and the foot appeared normal, he had no reason to know of the injurious effects of the x-ray until November 1970 when the area began to decompose. Which of these two positions is substantiated by the evidence is a question which the jury must decide. *Schaffer v. Larzelere*, 410 Pa. 402, 189 A.2d 267 (1963); *Ayers v. Morgan*, supra." *Id.* at 519-20, 331 A.2d at 727.

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[2] The highest court to which an appeal as of right can be taken in a negligence action.

From the above it is apparent that the special verdict questions submitted to the jury were framed to elicit the facts relevant under Pennsylvania law.

More to the point, this is solely a question of state law and its resolution in this case is of no importance to anyone but the parties. As such, it is not a question calling for review by this Court. Supreme Court Rule 19; *Appalachian Power Co. v. American Institute of Certified Public Accountants*, 4 L.Ed.2d 30, 80 S.Ct. 16 (1959) (opinion of Mr. Justice Brennan, in chambers). *Cf. Palmer v. Hoffman*, 318 U.S. 109, 118 (1943).

Conclusion

The only issue of any substance in this case was submitted to the jury agreed to by petitioners, and was decided by it. For the reasons set forth above, the arguments presented by petitioners are without merit and certainly not of sufficient moment to warrant granting of a writ of certiorari. It is respectfully submitted, therefore, that petitioners' petition should be denied.

Respectfully submitted,

ROBERT S. GRIGSBY,
THOMSON, RHODES & GRIGSBY,
Attorneys for Respondent.

APPENDIX

Stipulation

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

LINDA ANN MOUNT and JEROLD H. MOUNT,
her husband,
vs.
HAROLD R. SUMNER.

Civil Action No. 72-802.

AND NOW, January 21, 1974, it is stipulated and agreed that a jury of six (6) persons will be used; that one (1) alternate juror be called in the above entitled case. It is further agreed that if the number of jurors is reduced to five (5), that the verdict of the jury will be accepted.

It is further stipulated and agreed that any right to have the jury selected in the presence of a member of the Court and the recording by a Court Reporter of the *voir dire* in the selection of the jury is waived, and I am agreeable to the manner in which the jury was selected.

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Jerold H. Mount,
Plaintiff.

Linda Ann Mount,
Plaintiff.

H. GRIGSBY,
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